Supreme Court, U.S.
FILED
AUG 8 1980
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

No. ~~80-00~~ 80-28

JOHN WILMOT, Superintendent,
Elmira Correctional Facility,

Petitioner,

-against-

WILLIAM WALKER,

Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

TO: THE HONORABLE, THE CHIEF JUSTICE AND
THE ASSOCIATE JUSTICES OF THE SUPREME
COURT OF THE UNITED STATES

Pursuant to Rule 53(1) of the Rules of this Court, motion is hereby made that the respondent be allowed to proceed in forma Pauperis before this Court. Respondent's affidavit in support of this application is annexed hereto.

Dated: New York, New York
August 6, 1980

Respectfully submitted,

ALLEN E. BURNS
WILLIAM E. HELLERSTEIN
The Legal Aid Society
15 Park Row - 18th Floor
New York, New York 10038
[212] 577-3420
Attorneys for Respondent

STATE OF NEW YORK)
) ss.:
COUNTY OF GENESEE)

WILLIAM WALKER, being duly sworn, deposes and says:

I am respondent herein and make this affidavit in support of my application to proceed in forma pauperis in connection with the filing of the brief in opposition to to the petition for a writ of certiorari.

I am incarcerated pursuant to the judgment of conviction entered against me in this case.

I am without funds to pay the cost of printing my brief in opposition and retaining counsel.

In the New York State Appellate Courts, the United States District Court, and the United States Court of Appeals, I was allowed to proceed in forma pauperis and was represented by counsel associated with the Legal Aid Society of the City of New York. Such counsel have agreed to represent me in this Court without expense to me.

WHEREFORE, it is respectfully requested that the application for leave to proceed in forma pauperis be granted.

WILLIAM WALKER

Sworn to before me this
24 day of July, 1980

William L. Reed

WILLIAM L. REED
Notary Public, State of New York
Qualified in Genesee County
My Commission Expires March 30, 1982

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MICHAEL RODAK, JR., C

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No. 80-28

JOHN WILMOT, Superintendent, Elmira Correctional Facility,

Petitioner,

-against-

WILLIAM WALKER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT WALKER IN OPPOSITION

ALLEN E. BURNS
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QUESTION PRESENTED

Whether the Court of Appeals correctly affirmed the District Court's findings (1) that respondent credibly testified that the comments of the investigating detective and assistant district attorney confused him about the charges and gave him the false impression that he could avoid a homicide prosecution by confessing, and (2) that therefore respondent did not voluntarily waive his protection against self-incrimination under the Fifth and Fourteenth Amendments.

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The judgment and memorandum of the Court of Appeals and the judgment and opinion of the District Court for the Eastern District of New York appear in the Appendix to the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person shall. . . be compelled in any criminal case to be a witness against himself. . .

United States Constitution, Amendment XIV:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

STATEMENT OF FACTS

Brooklyn police arrested respondent William Walker and his companions, Roy A. Sanders and Seth Lee Doby, at about 4:00 p.m. on September 4, 1973 (R/A, Ex. C., pp. 7, 44).* The three youths were suspects in the attempted robbery and shooting of a storekeeper a short while earlier (id.). The victim died at a hospital, 15 or 20 minutes after the arrival of his wife, an eyewitness, who was apparently taken directly to the hospital from the scene of the crime (id., p. 98). Nevertheless, the investigating authorities did not reveal the fact of the death to Walker until some four hours later, after he had refused to speak for the third

* The Documents in the Record on Appeal to the United States Court of Appeals are designated herein by "R/A" followed by the appropriate Document number or Exhibit number or letter. Exhibit C is the full transcript of the May 27, 1975 suppression hearing in the Supreme Court of the State of New York, Kings County.

time and explicitly requested the presence of an attorney (F. 155-156, 164).*

Walker was just barely 17 years old when he was arrested (G. 3). His only previous conflict with the law had occurred a few months earlier, when he was arrested on a burglary charge that was ultimately reduced to trespass, a "violation" (G. 4). He was not questioned by police in connection with that case (id.).

Walker testified that at the 71st Precinct, where he, Sanders, and Doby were initially taken, he was told that even though his parents had no telephone, he could not call his aunt, who had one (G. 23). He also testified that District Attorney Eugene Gold appeared at the 71st Precinct, and the three suspects were ordered to stand up, face Mr. Gold, and turn around (G. 12).

Beginning about an hour after the arrests, Walker, Sanders, and Doby were held separately in the same large room at another police station, the 67th Precinct, which became crowded with people interested in the investigation, including numerous law enforcement officials and a rabbi from the victim's community (F. 183-184, 204, 209; H. 63-64). Then Walker was taken alone to a coffee room, where he was held for another two hours or more (H. 61-64, 81-83).

Walker testified that he was handcuffed constantly after his arrival at the stationhouse (G. 17). Detective Arthur Lasky, who was in charge of the investigation, initially was

* As in the Petition, parenthetical numbers preceded by "C" through "H" refer to pages of the Appendix filed with the United States Court of Appeals. "F" designates an excerpt from the transcript of the May 27, 1975 state court hearing; "G" designates the transcript of the October 12, 1978 District Court hearing; and "H" designates the transcript of the September 13, 1979 District Court hearing.

unable to recall Walker's being "restrained" (F. 204), though he acknowledged that the youth was not free to leave (id.). Ultimately, however, Lasky revealed his belief that Walker had been handcuffed by one arm to his chair, in accordance with standard procedure (H. 65). Lasky claimed he gave Walker an opportunity to telephone a relative, but he did not recall whether Walker's mother appeared at the stationhouse (F. 211).

Doby had been Lasky's first subject for interrogation, starting at about 5:15 p.m. (F. 204, 208). Within about 15 minutes, Doby confessed (F. 240). However, it was not until about 7:15, as he recalled, that Lasky interrogated his second subject, Sanders, who also quickly confessed (F. 185-186). Then Lasky moved on to Walker.

Before informing Walker of his Miranda rights, Lasky only told him he was "suspected of being involved in an incident [or perhaps an "attempted robbery"] on President Street" (F. 213). Walker's response to the reading of his rights was a refusal to make a statement (F. 176-177). About an hour later, Assistant District Attorney William Weinman addressed Walker. Weinman had arrived at the stationhouse around 6:00 p.m., at which time Lasky had told him Walker had refused to make a statement (F. 162-163).* Weinman subsequently took confessions from Sanders and Doby (R/A, Ex. C., p. 275). The assistant district attorney then proceeded to interview Walker, he claimed, merely because he wanted "to put on the record that he was given his rights" (H. 33).

* Lasky maintained that at this time, before his interrogation of Walker, he only gave Weinman his "opinion" that Walker did not want to give a statement (H. 81). Of course, Walker had not made a statement after receiving the Miranda warnings from the arresting officer (H. 11, 54).

Weinman's confrontation with Walker, beginning at 8:20 p.m., was stenographically recorded. R/A, Ex. 2. Initially, Weinman told Walker only that he wanted "to ask. . . some questions about an incident that took place at a grocery store" at the address and time in question (id., p. 19). Then Weinman recited the Miranda rights, finally eliciting not only Walker's refusal to answer questions but also his explicit request to have an attorney present (id., p. 21). Weinman then declared the interview concluded (id.).

A conversation off the record ensued between Lasky and Weinman. Lasky's initial account of it follows:

> ...there was a conversation between the District Attorney and myself in reference to the charges that should be put against Walker. And . . . when we started talking to each other, and the Assistant District Attorney told me charge him with the homicide and the attempted robbery, and then Walker said, what do you mean homicide? I didn't shoot anyone. And then the Assistant District Attorney said, we know that you didn't shoot anyone because Tony told us -- that's Sanders -- Tony told us that he shot the man. And then Walker said, is that right? Can I speak to Tony, at which time I went out of the room, I got Sanders back into the room and Walker said to Sanders, did you tell that man what happened there? And Sanders said, yes, I did. He said, did you tell him that you shot him? He said, I did, I told the man the whole truth. And then at which time the defendant said to Assistant District Attorney Weinman, I will tell you now what happened. And then there was a statement taken by the District Attorney (F. 177-178; emphasis added).

Weinman's account was similar:

> ...I don't know who instigated the conversation, but the substance was a query by Walker, if he was going to be arrested and charged with homicide and robbery, at which point he said, some-

> thing to the effect, that he didn't shoot anybody. And it was either myself or Lasky who told him it doesn't matter because Sanders has already admitted that he was the shooter but he implicated you because he said you were present in the store with a gun. At this point he stated, I don't believe you, I want to ask Sanders. At his request, Sanders was brought into the room, they had a face to face conversation. Walker asked Sanders, did you tell them that you shot this man, or words to that effect, and Sanders said yes. At this point Sanders was then taken back to where he was seated and Walker said, I will talk to you now, or words to that effect. And then we went back on the record (F. 155-156; emphasis added).

Both of these versions suggest that Walker spontaneously offered to confess after speaking to Sanders, but this accord has been shattered by Lasky's more recent testimony:

> ...Sanders in front of Walker and in front of the District Attorney said to Walker, "tell the man the truth, I told him that I shot him, tell the man the truth, tell the man exactly what happened." Then Mr. Weinman said to Mr. Walker, off the record, "are you willing to tell us what happened," he said, "yes," the District Attorney (sic) was brought in and a statement was taken by Mr. Weinman of Mr. Walker (H. 72; emphasis added).

This acknowledgement of a pointed, intervening question by Weinman prior to Walker's agreement to confess is similar to Walker's own testimony that after speaking to Sanders, he demanded to know what the charge was, and Weinman asked, "Are you going to speak? We'll see what it's going to be. Are you going to speak?" (G. 20).

The transcript of Weinman's interrogation of Walker confirms Weinman's testimony (F. 168-169) that he reopened his examination of Walker by eliciting negative answers to a series of questions, including whether Walker had been

threatened, beaten, or promised anything (R/A, Ex. 2, p. 23). But Walker did not answer "No" to the question whether anything had been done to him other than allowing him to talk to Sanders. Rather, Walker answered, "I asked you what charge it was, you said you'll see what it is and I still want to know the charge" (id.). Weinman responded, "At this point, the charge is attempted robbery and homicide." When Walker then denied shooting anybody, Weinman rejoined, "Nobody said you shot anybody, why don't you tell me what happened" (id.). Thereafter, Walker confessed his participation in the attempted robbery.

Apart from claims of physical intimidation rejected as incredible by the District Court, Walker explained that he ultimately confessed as requested because Weinman's equivocation about the charges led him to believe that his silence was hurting him and confessing might help "clear" him -- he had thought the charge should properly be attempted robbery or possession of a gun -- and because the repeated pressures to confess led him to believe that his requests not to be questioned and his expressed desire to have a lawyer present would not be honored (G. 20-21, 25-27). In fact, Weinman admittedly believed he was under no obligation to summon an attorney (H. 34-35).

Before speaking to Walker, Weinman felt his case was so strong he "would have been able to pick a jury that night and tried (sic) Walker" (H. 35). Nevertheless, he explained his ambiguous comments about the charges by claiming, first, that he thought that the taking of a can of soda and a plum from the store might not lead to a charge of felony murder (H. 19). Later, however, Weinman explained that when he told

Walker it did not "matter" that he did not shoot anybody, he thought the charge might be felony murder (H. 40).

Questioned further, Weinman explained the he meant that Walker would be arrested anyway, but he might not be indicted by the Grand Jury for felony murder (H. 42-43). But Weinman was "[a]bsolutely not" trying to suggest to Walker that the charge might change (H. 43). Nor did he expect his words, "Nobody said you shot anybody, why don't you tell me what happened" (R/A, Ex. 2, p. 23), to produce an expectation on Walker's part that it would be to his advantage to confess (H. 43-44).

Weinman never directly answered the District Court's question whether Walker inaccurately asserted in the interrogation transcript that Weinman told him off the record, "you'll see what [the charge] is" (H. 45).

Walker was indeed indicted for felony murder, as well as intentional murder (N.Y. Penal Law, §125.25, subds. (3) and (1) respectively). After the denial of his motions to suppress evidence in the Supreme Court of the State of New York, Kings County, Walker pleaded guilty to felony murder and was sentenced, on July 9, 1975, to imprisonment for 15 years to life (Rinaldi, J.). The judgment of conviction was unanimously affirmed without opinion by the Appellate Division, Second Department on July 11, 1977 (58 A.D.2d 1043, 396 N.Y.S.2d 749), and the Hon. Lawrence H. Cooke, then Associate Judge of the Court of Appeals of the State of New York, denied permission to appeal further on August 23, 1977.

On December 1, 1977, Walker filed his petition for a writ of habeas corpus in the United States District Court for the Eastern District of New York, claiming, among other things, that his confession was obtained in violation of his rights under the Fifth and Fourteenth Amendments to the United States Constitution.* After conducting a hearing, at which Walker testified, District Judge Charles P. Sifton denied the petition in a memorandum dated December 28, 1978, holding that Walker had effectively waived in state court his right to testify as to his Fifth Amendment claims, and that the state court record supported the state court's conclusion that the confession was not unconstitutionally obtained.

The District Court issued a certificate of probable cause to appeal, and on June 29, 1979, the Second Circuit Court of Appeals remanded the case to the District Court for further consideration of whether Walker received a full, fair and adequate hearing in the state court, and, if it found he did not, for consideration of Walker's and others' testimony relating to the merits of his claims. Walker v. Wilmot, 603 F.2d 1038, 1042.

Following a further hearing, the District Court granted Walker's petition in a decision dated November 2, 1979. Petition, Appendix A. Judge Sifton found that Walker did not receive a full, fair and adequate hearing in the state court, and therefore he considered the District Court testimony of Walker and other witnesses (id., p. 15). The judge found no reason to change his prior findings and conclusions

* This claim had been raised on his state court appeal.

rejecting Walker's claims of violation of the requirements of Miranda v. Arizona, 384 U.S. 436 (1966) (id., p. 16). However, focusing particularly on the testimony of Weinman and Walker, Judge Sifton did change his findings and conclusions as to whether Walker's confession was in fact voluntary.

Judge Sifton believed that Walker "was telling the truth" in claiming that he was confused and uncertain about the charges and that "the impression [was] incorrectly conveyed to him that he could avoid prosecution for killing a man by confessing" (id., pp. 17, 21). Accordingly, Judge Sifton held that Walker's decision to confess "was not knowing and intelligent, but was instead based on confusion and mistake" and hence involuntary, requiring suppression of the confession under the Fifth Amendment (id., p. 21).

The Court of Appeals held, in a memorandum dated April 23, 1980, that the District Judge's ultimate fact finding was "not clearly erroneous" and that he did not commit "reversible error" in concluding on the basis of this finding that Walker did not voluntarily waive his Fifth Amendment rights. Petition, Appendix B.

REASONS FOR DENYING WRIT

THE DECISION BELOW NEITHER APPLIED NOR ADDED TO MIRANDA'S RESTRICTIONS ON INTERROGATION, NOR DOES IT CONFLICT WITH OTHER FEDERAL DECISIONS. UNDER PRINCIPLES STATED BY THIS COURT LONG BEFORE MIRANDA AND REITERATED SINCE THAT DECISION, THE CONFESSION WAS NECESSARILY HELD INVOLUNTARY BECAUSE THE DISTRICT JUDGE CREDITED RESPONDENT'S DISTRICT COURT TESTIMONY THAT HE WAS MISLED BY THE INVESTIGATING OFFICIALS INTO BELIEVING THAT HE COULD AVOID A HOMICIDE PROSECUTION BY CONFESSING.

The State's petition to this Court argues that the decisions of the District Court and the Court of Appeals represent a novel expansion of the requirements of Miranda v. Arizona, 384 U.S. 436 (1966), in direct conflict with the decisions of other federal courts (Petition, pp. 4-6). This argument is insupportable. Neither the District Court nor the Court of Appeals based its decision on Miranda. Nor did either federal court below purport to articulate a new, general rule mandating explanation of charges to all criminal suspects before interrogation.

The District Judge explicitly reaffirmed his previous rejection of Walker's claims that Detective Lasky and Assistant District Attorney Weinman violated the "procedural safeguards" of Miranda* (Petition, Appendix A, pp. 15-16). Then he addressed what he saw as the main question: whether the confession was voluntary in the traditional sense (id.). Here, Judge Sifton's focus was primarily on the facts. Weinman attempted at the District Court hearing to explain his comments to Walker about the charges. Judge Sifton weighed that explanation against Walker's District Court

* These Miranda claims were argued before the Court of Appeals as alternative grounds for affirming the granting of the writ.

testimony concerning his interpretation of those comments, and the judge expressly credited Walker's claim that he confessed "as a result of an unfounded hope that by giving some account of himself he might be able to avoid a charge of having killed a man -- hope created, whether deliberately or not, by the conduct of the District Attorney who questioned him" (Petition, Appendix A, p. 16). This fact finding, restated no less than four times,* inevitably led to suppression of the confession as fundamentally involuntary, and the Court of Appeals properly so recognized by its summary affirmance. No further review is required.

In Bram v. United States, 168 U.S. 532 (1897), this Court declared that to be admissible, a confession must be "free and voluntary, that is [it] must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of

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* Judge Sifton also held Detective Lasky responsible for the inducement of Walker's false hope:

> ...most importantly, the petitioner was led, whether deliberately or not, to believe that by confessing he might avoid a charge of homicide (Petition, Appendix A, p. 19).
>
> * * *
>
> ...[Lasky's] statement suggested that the fact that he didn't shoot anyone meant that he could avoid the more serious charge (id., p. 21).
>
> * * *
>
> ...the impression conveyed to petitioner was that he might not be implicated in the shooting or charged with it if he gave an account of himself (id.).
>
> * * *
>
> ...the impression [was] incorrectly conveyed to him that he could avoid prosecution for killing a man by confessing ...(id.).

any improper influence . . . ." Id., at 542-543. This language was quoted in Malloy v. Hogan, 378 U.S. 1 (1964), preceded by the comment that "...the constitutional inquiry is not whether the conduct of the state officers was shocking ...." Id.,at 7. And in Brady v. United States, 397 U.S. 742 (1970), this Court distinguished Bram as follows:

> Bram dealt with a confession given by a defendant in custody, alone and unrepresented by counsel. In such circumstances even a mild promise of leniency was deemed sufficient to bar the confession, not because the promise was an illegal act as such, but because defendants at such times are too sensitive to inducement and the possible impact on them too great to ignore and too difficult to assess.
>
> Id., at 754.

These comments could hardly be more appropriate to the circumstances in the instant case, and they patently provide unimpeachable support* for the District Judge's conclusion that Walker did not voluntarily waive his Fifth Amendment rights.

The State argues that the decision below conflicts with other federal decisions, but the District Court clearly did not conclude, as the State's Petition asserts, "that a criminal suspect must be informed precisely of the nature of the charges about which he is being questioned before he may validly waive his Miranda rights" (Petition, p. 5). Judge Sifton did indicate that he was troubled by "the failure of anyone to make clear to petitioner in the face of his obvious concern . . . that, whether he confessed or not, would not affect the determination to charge him with homicide"

* The Bram test of voluntariness was reiterated in Hutto v. Ross, 429 U.S. 28, 30 (1976) (per curiam).

(Petition, Appendix A, p. 20). However, this was merely to point out that in these circumstances the authorities should have been aware of the substantial risk that a confession by Walker would be involuntary if not preceded by an easily rendered clarification of the fact that he would definitely be arrested for homicide.

Because Judge Sifton did not repudiate the general rule permitting waiver of Fifth Amendment rights by suspects ignorant of charges under investigation, the cases the State cites in support of that rule (Petition, pp. 5-6) are inapposite to this case. In the most analogous of those cases, defendants were found to have confessed voluntarily despite ignorance or confusion about their liability for felony murder. Cf. Harris v. Riddle, 551 F.2d 936 (4th Cir. 1977); Collins v. Brierly, 492 F.2d 735 (3d Cir.) (en banc),* cert. denied, 419 U.S. 877 (1974); United States ex rel. Smith v. Fogel, 403 F.Supp. 104 (N.D. Ill. 1975). However, in none of the cases cited by the State was there a fact finding comparable to the one here, that law enforcement officials obtained a confession as a result of a false expectation of benefit they had induced in a suspect confused about the charges.

* Contrary to the State's argument (Petition, p. 6), there is no reason to infer that Judge Sifton "relied on cases such as" Schenk v. Ellsworth, 293 F.Supp. 26 (D. Mont. 1968) and Commonwealth v. Collins, 436 Pa. 114, 259 A.2d 160 (Pa. Sup. Ct. 1969). Both these cases articulated Miranda - based rules for advice about charges, while, as discussed above, Judge Sifton did not rely on Miranda in granting relief. Moreover, of course, the rule of Commonwealth v. Collins was effectively rejected by the Third Circuit Court of Appeals in Collins v. Brierly, supra, 492 F.2d at 738-739.

The District Judge's fact finding was not only entitled to deference as an assessment of the credibility of witnesses who testified before him; the finding was also amply supported by the evidence as to the totality of the circumstances surrounding Walker's confession, particularly including his youth and inexperience, his lack of contact with a relative, his request for a lawyer, and his detection of Weinman's intention, ultimately admitted in court, not to provide a lawyer (H. 25, 34-35). Therefore, the District Judge's fact finding could not be found "clearly erroneous" under the applicable standard of review. FED.R. CIV. P. 52(a), and see, e.g. United States v. Friedman, 558 F.2d 1125, 1127 (2d Cir. 1977), cited in the Court of Appeals' memorandum, Petition, Appendix B.

The State argues otherwise, maintaining that Weinman did advise Walker "that he would be charged with homicide whether he confessed or not" (Petition, p. 10). But the record fails to verify this assertion. Weinman himself acknowledged, as the State notes (Petition, pp. 10-11), that his comments to Walker reflected his own uncertainty about Walker's potential liability for felony murder. It now appears that Weinman intended to arrest Walker for felony murder despite his uncertainty. However, he simply did not tell Walker so, nor did he say anything to indicate to the youth that the tentative quality of his comments about the charges was unconnected to the confession he clearly wanted Walker to render. In short, the record gives no support to the State's contention that the District Court's fact finding should have been overturned by the Court of Appeals and could now be overturned by this Court.

As the decisions below rest on a proper exercise of the District Court's authority to make fact findings and its application to those findings of a long-established constitutional rule, the case does not merit review by this Court.

CONCLUSION

FOR THE FOREGOING REASONS, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

ALLEN E. BURNS
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Attorneys for Respondent Walker

August, 1980